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IN THE

Supreme Court of the United States

MONICA CASTRO, for herself and as Next Friend of R.M.G.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

After a Fifth Circuit panel aligned itself with "a majority of other circuits," Pet. App. 32a, and held that the discretionary function exception of 28 U.S.C. § 2680(a) was overcome by plausible allegations that Border Patrol agents not only committed torts under Texas law but also acted unconstitutionally and *ultra vires*, Pet. App. 38a, the Government moved for rehearing en banc. It represented that the panel's holding presented a question "of exceptional importance." Pet. Reh'g i. It further argued that the Fifth Circuit had previously held that such allegations are insufficient. *See* Pet. Reh'g 9-10. The en banc court having cursorily adopted the Government's position over well-reasoned dissents, *see* Pet. App. 4a-18a, the Government tries to insulate its victory by claiming that the scope of Section 2680(a) was neither raised nor decided below and that there is no conflict among the circuits.

1. In making the claim that this case does not properly raise the questions presented, BIO 9-13, the Government distorts or ignores the record.

a. With respect to Section 2680(a) and *ultra vires* or unconstitutional conduct – the first question presented – the Government acknowledges that petitioners presented the issue to the court of appeals, both before the panel and en banc, BIO 11, but asserts that they failed to present it to the district court.

Not true. Petitioners' complaint alleged, with respect to each cause of action, that the Government was "not entitled to any defense" because its acts "were not discretionary functions." Pet. App. 90a,

91a, 92a, 93a, 94a. It also alleged violation of "R.M.G.'s right to be free from unreasonable seizure guaranteed by the Fourth Amendment," Pet. App. 86a, and "Plaintiffs' fundamental substantive due process right to family integrity and protection against unreasonable government intrusion into family relationships," Pet. App. 88a. Finally, it alleged that agents acted beyond their statutory authorization. Pet. App. 89a. In their response to the Government's motion to dismiss, petitioners explained the legal import of these allegations in the same terms they have continued to use before the court of appeals and this Court: "[C]ourts have 'not hesitated to conclude that [official] action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.'" Pl. Resp. 9 (citation omitted).

b. The Government's contention that petitioners failed to argue the relevance of the law enforcement proviso – the second question presented – is equally misplaced.

Petitioners' briefing before the district court invoked the Fifth Circuit's decision in *Sutton v. United States*, 819 F.2d 1289 (1987), as a roadmap for applying the FTCA to their case. Pl. Resp. 9. The central question in *Sutton*, as the opening sentence declared, was "the interplay" between Sections 2680(a) and (h). 819 F.2d at 1290. *Sutton* suggested that claims within Section 2680(h) would not be barred by Section 2680(a). *See* 819 F.2d at 1293-95. Petitioners' citation of *Sutton* adequately preserved the argument they advance here. The district court clearly understood that petitioners were invoking

Section 2680(h). *See* Pet. App. 65a n.9. That the court nonetheless applied the discretionary function exception to these causes of action is its mistake, not petitioners'.

Petitioners renewed their reliance on *Sutton* before the court of appeals. *See* Pl.'s C.A. Br. 18. And even the Government admits that petitioners squarely presented the question to the en banc court, BIO 12, which rejected that claim over two dissents. The Government's vehicle argument is thus meritless.

c. Finally, the Government paradoxically argues that the en banc majority's failure to offer any analysis to support its conclusions provides a reason to deny review. *See* BIO 9, 12-13.

This Court "reviews judgments, not opinions." *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). It often grants review in cases where cursory appellate decisions have swept important issues of federal law under the rug. *E.g.*, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2981 (2010); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007); *Strickler v. Greene*, 527 U.S. 263, 265-66 & n.1 (1999). Given the importance of the questions presented, this Court should not permit the Fifth Circuit to insulate its outlier approach to interpreting the FTCA.

2. This case implicates two important conflicts among the courts of appeals.

a. With respect to the second question presented, the Government does not contest that the courts of appeals are split on whether Section 2680(h) permits

certain claims to proceed regardless of the discretionary function exception. *See* Pet. 28-34; Br. Amici Curiae Nat'l Immigration Project *et al.* 7-8; BIO 24-25.

b. With respect to the first question presented – whether Section 2680(a) applies when employees exceed the scope of their statutory or constitutional authority – the Government claims that "[t]here is no dispute among the circuits." BIO 13. Would that it were so. But as the petition explains, although seven courts of appeals have held that the exception does not cover *ultra vires* or unconstitutional acts, the Fifth and Seventh Circuits have held that it does. Pet. 15-20; *see also* Br. Amici Curiae 6-7.

Nowhere does the Government acknowledge, let alone try to distinguish, the decisions petitioners cite adopting the minority position. It simply ignores them. The Government's failure to address *Santos v. United States*, 2006 U.S. App. LEXIS 10261 (5th Cir. 2006), is particularly egregious, given its express reliance on that case in its briefing before the en banc Fifth Circuit as the exemplar of that Circuit's rule that allegations of unconstitutional conduct do not overcome the discretionary function exception. *See* U.S. Pet. Reh'g 9-10; U.S. Supp. En Banc Br. 18.

The Government's denial of a conflict rests on two fundamental errors: it misunderstands the operative language in this Court's prior decisions; having done so, it misleadingly relies on court of appeals decisions having nothing to do with constitutional violations.

In *United States v. Gaubert*, 499 U.S. 315, 322 (1991), and *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), this Court stated that the discretionary

function exception is unavailable when a "federal statute, regulation, or policy specifically prescribes a course of action." The Government italicizes the phrase "specifically prescribes," BIO 14, and claims there must be a "specific prescription," BIO 13, to overcome the discretionary function exception.

But the Government's focus on *prescription* misses a key point. Congress does not specifically prescribe affirmative courses of action in areas that fall outside a federal actor's grant of authority. Pet. 22. Moreover, constitutional law – as opposed to the regulatory statutes at issue in *Gaubert* and *Berkovitz* – operates primarily through *proscription*. When constitutional law forbids conduct, there will be no "mandate" directing officers to take a "specific" course of action. Thus, even if a *prescription* must be specific to remove the "element of judgment or choice" that would otherwise require an agent to exercise discretion, *Berkovitz*, 486 U.S. at 536, a rule *prohibiting* action need not be similarly detailed.

For example, a regulation instructing federal employees to "move cargo eleven feet to the left" leaves no room for discretion, while one directing employees to "move cargo" requires choice and judgment. But a rule prohibiting the official from moving cargo at all need not also specify that he should not move the cargo to the left or to the right, eleven feet or one foot. Anything falling within the prohibition necessarily falls outside the "range of choice" available to the official. *See id.* at 538; Pet. 16.

Likewise, when the Constitution forbids immigration officials from detaining or removing a U.S. citizen, that general proscription is sufficient to

constrain the Border Patrol's "range of permissible courses" of action. *Gaubert*, 499 U.S. at 325. As this Court recently explained, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

The Government fails to recognize that the language it quotes from *Gaubert* and *Berkovitz* was directed not at constitutional proscriptions, but only at affirmative prescriptions. Accordingly, the Government cites a series of decisions by the courts of appeals addressing whether an affirmative regulatory mandate is sufficiently specific to eliminate the government's discretion. *See* BIO 16. But those cases have nothing to do with how the exception should be analyzed in the face of a constitutional prohibition.

3. The facts here squarely implicate the circuit splits. The Government does not dispute that if it held R.M.G. in immigration detention and was responsible for removing her from the country, then it exceeded its constitutional and statutory authority. Indeed, while this case was pending en banc, the Government asserted that "[k]nown U.S. citizens," including children, "are not placed in immigration detention." Pet. 24 (quoting a 2009 official report).[1]

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[1] The Government claims that this report is irrelevant because its discussion does not apply to the Border Patrol. BIO 19 n.7. The Government is wrong. The Report expressly refers to "staff from CBP's Office of Border Patrol" and states that "if CBP . . . identifies the child as a U.S. citizen, the child is released to the parent's designated custodian or to Child Protective Services." OIG Report 11.

See also Br. Amici Curiae 16-17 (discussing problems with the detention and removal of U.S. citizens); Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, States Without Nations (July 15, 2010) (same).[2] Outside the Fifth Circuit, the Government has settled such cases. *See, e.g.*, *Guzman v. United States*, Case No. CV08-01327 GHK (SSx) (C.D. Cal. May 4, 2010) (FTCA case involving mentally disabled citizen deported to Mexico and separated from his mother for 85 days); *Reyes v. Alcantar*, Case No. C07-2271-SBA (N.D. Cal. June 20, 2008) (FTCA claim of seven-year old citizen held, along with his non-citizen father, for approximately twelve hours).

Only by ignoring or misstating the allegations in petitioners' complaint can the Government argue that this case does not implicate the splits because it involves nothing more than a "determination not to upset the status quo of custody." BIO 22.[3]

a. The Border Patrol placed and kept R.M.G. in immigration detention, thereby exceeding both

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Moreover, petitioners only "acknowledged" that no policy covered the officers' actions, BIO 19, because the *Government* made that untrue representation before the district court. Pet. App. 71a n.11.

[2] Available at http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html.

[3] The Government's statement that "Gallardo is concededly the child's father and had lawful custody of her," BIO 23, is misleading. While Gallardo was R.M.G.'s father, petitioners have *never* conceded that he had "custody" of her as a matter of family law. *See* Pet. App. 72a.

statutory and constitutional authority. *See* Pet. 23-27. That it also seized and detained Gallardo does not undercut that conclusion. This Court has unanimously held that persons detained while accompanying the "motivating target" of a seizure – there, an automobile stop – are nevertheless "seized within the meaning of the Fourth Amendment." *Brendlin v. California*, 551 U.S. 249, 251, 261 (2007). Here, in the course of arresting Gallardo (during an armed immigration raid it ludicrously calls a "visit[]," BIO 4), the Government also removed R.M.G. from her home, transported her to a Border Patrol facility, and placed her in a locked, guarded immigration detention cell (part of the time without her father, R. 690:162). Tellingly, the Government never suggests that R.M.G. was free to leave. Instead, it depends on the fortuity that R.M.G. could neither walk nor talk (although she could, and did, cry for her mother, Pet. App. 85a) to avoid dealing with the fact she was seized.

The Government acknowledges that if Castro had accompanied agents on their raid, they would have given her R.M.G., BIO 3-4 – without regard to Gallardo's wishes – because R.M.G. was a citizen, Pet. App. 83a. Castro's reasonable refusal to accompany them in seeking a man wanted for questioning in a homicide, Pet. App. 57a,[4] changes nothing. At all relevant times, Border Patrol officials

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[4] The agent responsible for the raid conceded he had never before permitted a private citizen to accompany officers: Doing so is neither recommended by department policies nor advisable. *See* R. 686:141-42.

had the power to release R.M.G. to Castro but chose instead to keep the child in their physical control and to deny Castro contact with her child. When asked to distinguish between "handing the child over at the trailer and handing the child over at [the] border patrol station," Agent Sanchez responded that there was "probably no difference at all." Sanchez Dep. 178-79.

In any event, the Government's bland assertion that "parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights," BIO 21 (quoting Pet. App. 46a n.6), is beside the point, since Castro squarely asserted R.M.G.'s right not to be detained.

b. The Government is equally mistaken when it argues that Gallardo's willingness to have R.M.G. transported across the U.S. border somehow "dispenses" with the claim that it effected her removal. BIO 21. Without the Government's involvement, Gallardo could not have taken R.M.G. out of the country absent Castro's permission. Pet. 25-26. Both Mexican and U.S. law prohibited Gallardo from doing so on his own. Mexican law required any child traveling with one parent to present a notarized statement of consent from the other parent prior to entry. Manual de Trámites Migratorios del Instituto Nacional de Migración, Diario Oficial de la Federación [DO], 21 de Septiembre de 2000 (Mex.). Nor would the United States have issued a passport to R.M.G. without Castro's consent. *See* 22 C.F.R. § 51.27(b)(2) (2003). As petitioners have already explained, not only did the Government's active participation in Gallardo's removal of R.M.G. from the country violate federal

policy, but it also deprived Castro of her clearly established parental rights under the Fifth Amendment. Pet. 27-28. That Fifth Amendment violation does not depend on R.M.G.'s having first been detained.

c. Seeking to suggest that R.M.G. was never within its control and to deflect attention from its own actions, the Government suggests that Castro brought these tragic events upon herself. Not so. Leave aside that the two days between when Castro fled home and when she contacted the Border Patrol, BIO 3, were the Thanksgiving weekend. Petitioners alleged that Border Patrol agents told Castro they "would not allow Mr. Gallardo to take the child to Mexico if he were deported." Pet. App. 83a. Not until mid-morning on the day of the raid did the Government first inform Castro it "would not release the child and that Plaintiff R.M.G. would be deported" that day, Pet. App. 84a. Within a few hours of learning that the Government had reneged on its promises (without which Castro would never have informed agents where they could find Gallardo and R.M.G., *see* Pet. App. 83a), Castro obtained counsel. Pet. App. 85a. The Government's blame-the-victim strategy compounds the Border Patrol's wrongful behavior.

4. With respect to the merits, the Government renews the argument it made before the Fifth Circuit that if the discretionary function exception is defeated by claims of unconstitutionality at all, the exception should be overcome only in cases where the unconstitutionality of the Government's conduct is clearly established. In short, the Government asks this Court to incorporate into the FTCA the qualified

immunity defense available in *Bivens* actions. *See* BIO 24. That argument finds no support in the text of the FTCA or this Court's decisions and, in any event, cannot support the judgment in this case.

a. To be sure, an individual official in a *Bivens* action enjoys qualified immunity unless his conduct violated clearly established rights. BIO 14. But qualified immunity has never been available to the United States as a defense against liability for state-law torts under the FTCA. *See Carlson v. Green*, 446 U.S. 14, 21 & n.7 (1980); *Castro v. United States*, 34 F.3d 106, 111 (2d Cir. 1994) ("[U]nder the FTCA, the United States is not entitled to defend on the basis of any official immunity that its executive employees individually might possess.").

The justification for qualified immunity "loses its force" when an entity – "in contrast to [an] official" – faces liability. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980). For individuals, qualified immunity ensures that "the threat of *personal* monetary liability" does not distort "the decisionmaking process." *Id.* This "inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed." *Id.* at 656; *see also Butz v. Economou*, 438 U.S. 478, 497 (1978) (qualified immunity reduces the "danger that the threat of [personal] liability would deter [an officer's] willingness to execute his office") (internal citation omitted). Moreover, with respect to Section 2680(h), Congress clearly intended to permit cases to go forward regardless of whether there was *Bivens* liability. *See* Pet. 34-38.

b. Under the facts alleged in the complaint, there were "clearly established" constitutional violations.

Pet. 26-28. If nearly a century of unbroken precedent regarding treatment of U.S. citizens by immigration authorities and the substantive due process rights of parents does not clearly establish the law, it is difficult to imagine any case where unconstitutional conduct would overcome the discretionary function exception. Indeed, the Government itself has acknowledged that if Border Patrol agents "detained and arrested a known U.S. citizen," their actions would be "*clearly* outside their statutory authority." U.S. Br. 13, *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010) (emphasis added).

5. The district court dismissed petitioners' complaint on jurisdictional grounds, Pet. App. 53a, so – contrary to the Government's suggestions, BIO 26-27 – the viability of petitioners' state-law claims can and should be addressed on remand, rather than by this Court in the first instance. In any event, it is hardly "difficult to fathom," BIO 26, how a party who locked an infant away from her mother, disregarded the mother's attempts to keep the baby from being removed from the country, refused to assist the mother in finding her baby, and engaged in the other acts alleged here would be liable to both mother and child under Texas law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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